

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

ePLUS INC.,)	
)	
Plaintiff,)	Civil Action No. 3:09-CV-620 (REP)
)	
v.)	
)	
LAWSON SOFTWARE, INC.,)	
)	
)	
)	
Defendant.)	

PLAINTIFF ePLUS, INC.'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION *IN LIMINE* NO. 8: TO PRECLUDE DEFENDANT LAWSON SOFTWARE, INC. FROM PROFFERING ANY EVIDENCE, EXPERT OPINION, OTHER TESTIMONY, OR ARGUMENT WHICH IS INCONSISTENT WITH THE COURT'S *MARKMAN* CLAIM CONSTRUCTION ORDER

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Defendant Lawson Software, Inc. (“Defendant” or “Lawson”) concurs with the proposition that the parties may not introduce evidence or make arguments that contradict or are inconsistent with this Court’s claim construction pursuant to *Markman*, but it opposes Plaintiff *ePlus, Inc.*’s (“*ePlus*”) motion which asks the Court to exclude any such inconsistent evidence or argument.

ePlus’s motion does no more than recognize black-letter patent law and this Court’s primary role in construing the claims pursuant to *Markman*. The Model Jury Instructions of the American Intellectual Property Association (“AIPLA”) provide this same direction to the jury. *See* Ex. 11 (AIPLA Model Jury Instruction No. 2.1 “Claim Construction for the Case”) (“It is my job as judge to provide to you the meaning of any claim language that must be interpreted. You must accept the meanings I give you and use them when you decide whether any claim of the patent has been infringed and whether any claim is invalid.”).¹ This Court provided the same instruction to the jury in the *SAP* litigation.

Defendant relies on case law holding that whether an asserted claim is invalid for lack of an adequate written description is a fact issue for the jury, which is not foreclosed by the Court’s claim construction. Regardless whether the written description issue is one of fact, however, Defendant should not be permitted to elicit expert opinion that is based upon its disagreement with the Court’s *Markman* ruling. Defendant’s response does not address *ePlus*’s point that Defendant’s expert witness, Dr. Shamos, openly stated in his deposition that he disagrees with this Court’s *Markman* ruling. Dkt No. 279 at 4. Dr. Shamos bases his written description opinion on disagreement with the Court’s claim construction, which he does not find “satisfactory.” *Id.* This is the very point that *ePlus*’s motion is intended to address, and the very

sort of testimony the jury should be precluded from hearing. Neither the parties' counsel nor their expert witnesses should be permitted to stand before the jury and argue inconsistently with the Court's *Markman* ruling or to argue that the Court's *Markman* ruling is "unsatisfactory," effectively inviting the jurors to reconsider the merits of that ruling.

ePlus therefore respectfully requests that the Court grant its motion *in limine*.

Respectfully submitted,

July 12, 2010

/s/

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¹ The referenced exhibit is included within the Appendix of Exhibits filed concurrently with *ePlus*'s reply briefs in support of its motions *in limine*.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2010, I will electronically file the foregoing

PLAINTIFF ePLUS, INC.'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION *IN LIMINE* NO. 8: TO PRECLUDE DEFENDANT LAWSON SOFTWARE, INC. FROM PROFFERING ANY EVIDENCE, EXPERT OPINION, OTHER TESTIMONY, OR ARGUMENT WHICH IS INCONSISTENT WITH THE COURT'S *MARKMAN* CLAIM CONSTRUCTION ORDER

with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF) via email to the following:

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